IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1026

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF *AMICUS CURIAE*

Of Counsel:

WILLIAM H. CRABTREE
General Counsel

EDWARD P. GOOD
Senior Attorney

Motor Vehicle Manufacturers Association of the United States, Inc.
300 New Center Building
Detroit, Michigan 48202

HERBERT RUBIN
MICHAEL HOENIG
HOWARD S. EDINBURGH

HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680
Attorneys for Motor Vehicle Manufacturers Association of the United States, Inc. as Amicus Curiae

TABLE OF CONTENTS

	PAGE
Motion	1
Brief	6
Introduction and Statement of Interest of *Amicus Curiae*	6
ARGUMENT:	
I. Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Violate the Supremacy Clause	9
II. Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Unduly Burden Interstate Commerce	20
CONCLUSION	25

Table of Cases Cited

	PAGE
Arbet v. *Gussarson*, 66 Wis. 2d 551, 225 N.W. 2d 431 (1975)	18
Baumgardner v. *American Motors, Corp.*, 83 Wash. 2d 751, 522 P.2d 829 (1974)	14
Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959)	22
Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)	10
Dawson v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980)	2, 3, 6, 7, 15, 21, 23, 24
Dreisonstok v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974)	3, 13
Evans v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966)	19

PAGE

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 12, 17

Ford Motor Co. v. *Coleman*, 402 F. Supp. 475 (D.D.C. 1975), aff'd mem., 425 U.S. 927 (1976) 4

Georgia v. *Chatanooga*, 406 F.2d 830 (6th Cir. 1969) 21

Gray v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970) 13, 23

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 9, 17

Huddell v. *Levin*, 537 F.2d 726 (3d Cir. 1976) 3

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 10

Knippen v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976) 19

Larsen v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) 2

Linn v. *United Plant Guard Workers*, 383 U.S. 53 (1966) 12, 16, 20

Michigan Public Utilities Comm'n v. *Duke*, 266 U.S. 570 (1925) 21

Morgan v. *Virginia*, 328 U.S. 373 (1946) 21

Northern States Power Co. v. *State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 1972) 9, 15, 16

Perez v. *Campbell*, 402 U.S. 637 (1971) 19

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 22

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) .. 10

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 22

Roberts v. *May*, 41 Colo. App. 82, 583 P.2d 305 (1978) 18

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 10, 16, 17, 20

Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964) 11, 16, 20

PAGE

Seattle—First National Bank v. *Talbert*, [1970-1973] Prod. Liab. Rep. (CCH) ¶ 6550 (Wash. Super. Ct. 1970) 14

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 22

Stonehocker v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978) 3, 18

Volkswagen of America, Inc. v. *Young*, 272 Md. 201, 321 A.2d 737 (1974) 14, 19

Walton v. *Chrysler Corp.*, 229 So. 2d 568 (Miss. Sup. Ct. 1969) 14

Western Union Tel. Co. v. *Brown*, 234 U.S. 542 (1914) 21

Table of Constitutional Provisions and Statutes Cited

PAGE

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et. seq.* (1976) ..... *passim*

15 U.S.C. § 1391(1) 23

15 U.S.C. § 1392(a) 23

15 U.S.C. § 1392(d) ..... *passim*

15 U.S.C. § 1397(c) 17, 18, 20

United States Constitution, Article I, Section 8, Clause 3 21

United States Constitution, Article VI, Clause 2 9

Table of Other Authorities Cited

	PAGE
BNA, *Product Safety and Liability Rptr.* 110 (Feb. 1, 1980)	17
112 Cong. Rec. 19663 (1966)	19
Federal Motor Vehicle Safety Standards, 49 C.F.R. § 571 *et. seq.*	*passim*
49 C.F.R. § 571.207	14
49 C.F.R. § 571.212	13, 23
49 C.F.R. § 571.301-75	14
Federal Rules of Evidence:	
Rule 703	3
Rule 704	3
Rule 705	3
Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases,* 16 Washburn L.J. 600 (1977)	2
Hoenig & Goetz, *A Rational Approach to "Crashworthy" Automobiles: The Need for Judicial Responsibility,* 6 Southwestern U. L. Rev. 1 (1974)	2
H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966)	11, 18, 22
Restatement (Second) of Torts § 402A (1965)	21, 23
S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2709	11, 13, 17 18, 22
Tien & Testa, *Critical Assessment of Social and Economic Implications of Safety Cars,* 28 (August, 1974)	15

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1026

—0—

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—0—

MOTION OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), pursuant to Rule 42 of this Court, respectfully requests leave to file a brief *amicus curiae* in general support of the petitioner, Chrysler Corporation ("Chrysler"). The petitioner has consented to MVMA filing such a brief, but the respondents have not consented.

MVMA is a trade association of United States automobile, truck and bus manufacturers whose member companies produce more than 99 per cent of all domestically built motor vehicles.

MVMA and its members have a real and vital interest in filing a brief *amicus curiae* in opposition to the decision below. That decision [presently reported as *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980)], while reluctantly affirming a judgment against Chrysler exceeding 2.5 million dollars, criticizes the existing arrangement whereby "individual juries in the various states are permitted, in effect, to establish national automobile safety standards." [630 F.2d at 953] The result, says the court, is a predictable "incoherence in the safety requirements set by disparate juries" as well as the possibility that a jury-established automobile safety standard will conflict with other important policies of national dimension. [630 F.2d at 953]

MVMA respectfully submits that the court below seriously erred in its conclusion that the enormous problems it perceived were "beyond the competence of this Court to resolve." [630 F.2d at 953] On the contrary, the complex public policy questions raised in the instant case (and hundreds of other similar suits now pending against MVMA member companies) speak to fairly common, classic and traditional constitutional issues often confronted by the federal courts: "preemption" and "burden upon interstate commerce."

The multi-million dollar judgment against Chrysler in the instant case stems from a relatively recent phenomenon in products liability law—the so-called automobile "crashworthiness," "second collision" or "enhanced injury" claim.[1] In such suits the contention is not that a defect

---

[1] The judicial genesis for permitting "crashworthiness" claims to be tried is generally conceded to be the Eighth Circuit's decision in *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). See generally Foland, *Enhanced Injury: Problems of Proof in "Second Collision" and "Crashworthy" Cases*, 16 Washburn L.J. 600 (1977); Hoenig & Goetz, *A Rational Approach To "Crashworthy" Automobiles: The Need for Judicial Responsibility*, 6 Southwestern U.L. Rev. 1 (1974) (also contains early discussion of "burden upon commerce" implications at pp. 59-65).

caused the accident but rather that a design or construction feature of the vehicle "enhanced," "aggravated" or failed to minimize the claimant's injuries to some extent. Invariably, such claims involve contentions that the car or the allegedly offending feature should have been made "safer" or "better" or "stronger" or "differently" in some way so as to mitigate injuries to some extent in some accident. Usually such suits involve testimony by experts for the claimant[2] that the car's performance was deficient or "defective" in some way and that some alternative design or feature would have been "better" for the claimant in such accident. The trial process results, as the Third Circuit admits, with the jury, in effect, "establishing" or "setting nationwide automobile safety standards" [630 F.2d at 953, 962] on an *ad hoc,* case-by-case basis with conflicting requirements being imposed upon manufacturers. Such requirements may be in possible derogation of legislative safety standards and of mandated or nationally desirable safety and energy objectives [630 F.2d at 953, 962-63].

The result is a clash of epic proportions between official state activity (in the form of conflicting court-allowed litigation and judgments regarding standards of automotive crash safety performance) and federally-mandated motor vehicle safety standards governing crash safety performance which Congress has declared must be nationally uni-

---

[2] E.g., *Dawson* v. *Chrysler Corp.*, 630 F.2d at 954, 958, 960 (plaintiff's experts included a "design analyst," a "mechanical engineer" and a "biochemical engineer.") See also *Huddell* v. *Levin,* 537 F.2d 726 (3d Cir. 1976); *Dreisonstok* v. *Volkswagenwerk, A.G.,* 489 F.2d 1066 (4th Cir. 1974). Under Federal Rules of Evidence 703-705 a mere opinion by a paid expert may trigger a jury's ability to set crash performance standards in conflict with those mandated by the National Highway Traffic & Safety Administration ("Agency") after years of research and testing. See, e.g., *Stonehocker* v. *General Motors Corp.,* 587 F.2d 151, 158-59 (4th Cir. 1978) (jury question presented about roof crash performance standards even upon "thin testimony" of experts "in a field in which they had little knowledge").

form. Given the explicit provisions of the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") that states are proscribed from adopting safety standards "not identical" to the federal standards regulating the "same aspect of performance" [15 U.S.C. § 1392(d)] and an expressive legislative history, a major and novel "preemption" question is presented which should be reviewed and resolved by this Court.

Furthermore, since "crashworthy" claims, by their nature, involve contentions that a particular car crash could have been made "safer" or "better" in some way, each injurious collision could generate a potential lawsuit alleging that some car feature should have been made differently. Because of the inevitable frequency of accidents and possibility of high damage awards, the potential litigation exposure is staggering and the potential for adverse judgments is astronomical. Establishment by the states of conflicting, *ad hoc,* non-uniform crash performance safety standards via litigation presents a substantial question of an unconstitutional burden upon interstate commerce which should be reviewed and resolved by this Court.

Despite more than fourteen years of extensive Safety Act operation, this Court has only rarely reviewed the Act's enforcement[3] and never upon the constitutional issues posed here by conflict of jury-established crash performance standards with Federal Motor Vehicle Safety Standards. The decision below does not resolve these issues; it avoids them. It suggests that courts may not act to cure constitutional impediments. It prolongs a climate of uncertainty in which litigants may be encouraged to file frivolous, marginal, costly and time-consuming litigation based upon performance standards that may compete with national

---

[3] See *Ford Motor Co.* v. *Coleman,* 402 F.Supp. 475 (D.D.C. 1975), *aff'd mem.,* 425 U.S. 927 (1976).

priorities. Furthermore, even were Congress to act, as suggested by the court below, it is arguable that any remedial action would not affect the hundreds of similar lawsuits currently pending against MVMA's member companies or which may be filed prior to any conceivable enactment.

In short, the problem is now clearly presented and the time is ripe for review. An economically-beleaguered industry and an energy-starved nation cannot afford the costs of astronomical verdicts if they are based upon prohibited standard-setting by the states. Accordingly, MVMA submits this brief as *amicus curiae* to urge this Court to accept review of this matter for the purpose of dissipating the confusion engendered by the decision below and to consider all policy ramifications bearing upon the constitutional issues.

WHEREFORE, it is respectfully requested that the MVMA be granted leave to file a brief *amicus curiae.*

Dated: New York, New York, January 19, 1981

Respectfully submitted,

Of Counsel:

WILLIAM H. CRABTREE
General Counsel

EDWARD P. GOOD
Senior Attorney

Motor Vehicle
Manufacturers Association
of the United States, Inc.
300 New Center Building
Detroit, Michigan 48202

HERBERT RUBIN
MICHAEL HOENIG
HOWARD S. EDINBURGH

HERZFELD & RUBIN, P.C.
40 Wall Street
New York, N. Y. 10005
(212) 344-0680
Attorneys for Motor Vehicle Manufacturers Association of the United States, Inc. as Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1026

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.

Introduction and Statement of Interest of *Amicus Curiae*

The decision of the Court of Appeals in this proceeding recognizes a grave problem of national significance in automobile "crashworthiness" cases but opts against its resolution by courts because it is "beyond" their "competence" [630 F.2d at 953]. Instead, the court below, though finding that jury-established national automobile safety standards

lead to "incoherence in the safety requirements," potential "conflict with other policies" of national interest, and imposition on manufacturers of "conflicting requirements," is content to merely "bring the problem to the attention of the legislative branch" [630 F.2d at 963]. The court says that since Congress "designed this system" of "regulation by ad hoc adjudications," Congress is "best suited" to "change that system." [630 F.2d at 963]

MVMA's member companies, as automobile manufacturers, are directly threatened by the continuation of a climate of uncertainty in which jury-established standards conflict with federal standards or priorities and in which costly and time-consuming litigation leads to adverse multi-million dollar judgments. MVMA respectfully submits that the court below seriously erred. Issues of classic constitutional dimension are fully presented by the clash between federal safety standards, which Congress has unequivocally declared must be uniform, and *ad hoc* jury-established standards that vary from accident to accident and case to case. These issues of "preemption" and undue "burden upon interstate commerce" are properly to be resolved by the courts. Furthermore, the arrangement by which juries set national standards was *not* created by Congress. On the contrary, Congress expressly prohibited any state from establishing motor vehicle safety standards which are not "identical" to the federal standards [15 U.S.C. § 1392(d)]. The jury system of standard-setting emanates from and is tolerated by the courts. Therefore, it is proper for the courts to solve the "preemption" and "burden of commerce" questions. Finally, leaving the problem for Congress to solve at some uncertain point in the future would not affect the hundreds of similar lawsuits currently pending against MVMA member companies as well as those suits which would be filed prior to any congressional action.

The foregoing issues are very clearly presented because Congress has expressly proscribed non-"identical" state standards and an expressive legislative history amply reflects the federal objective of uniformity. The potential financial burden to manufacturers is substantial. Court-made damage awards are, according to prior decisions of this Court, a form of state activity that must comport with constitutional requirements. Accordingly, the issue is ripe for review by this Court upon full briefs of the litigants and interested parties.

It is evident that manufacturers other than Chrysler are materially affected by the nature of the precedent below and the Third Circuit's refusal to "grapple" with the serious problems it recognized. Manufacturers need to know in advance the performance standards with which they must comply because cars cannot be redesigned from accident to accident. Manufacturers spend millions of dollars on research and development, tooling, testing and quality control in order to comply with Federal Motor Vehicle Safety Standards promulgated by an expert agency. Such standards may take years to develop and formulate. Yet they may be contravened by a given jury in a two-week trial in which considerable time is spent upon "sympathy issues." States must not be allowed to indirectly establish, via litigation, those same inconsistent safety standards that they are forbidden by the Safety Act to establish directly. At the same time, the common law rights of injured consumers to recover for defects in products must be harmonized with national standards and policy objectives, congressional intent and constitutional requirements.

MVMA and its member companies have a real and vital interest in filing this brief *amicus curiae* in support of the petitioner since the effect upon the industry of the decision below is direct and immediate. However, also at stake is the public interest at large. The costs of huge verdicts and in-

consistent standards must ultimately be partially borne by the consumer. New automobiles that become prohibitively expensive may be denied to all except the affluent. Manufacturers who cannot sell cannot compete and bankrupted companies will result in loss of jobs, and severe impact upon related industries like parts and materials suppliers, franchise dealers and service stations. Thus, the significance of the issues transcends the bounds of the dispute between the litigants below. The nation and one of its key industries is vitally affected.

Accordingly, MVMA seeks leave to file this brief as *amicus curiae* in order to persuade this Court to fully consider and resolve the constitutional and policy questions avoided by the court below.

ARGUMENT

I.

Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Violate the Supremacy Clause.

The doctrine of "federal preemption" is rooted in the "Supremacy Clause," Article VI, Clause 2 of the United States Constitution. Once it is determined that the federal government has power to regulate in a given area, the key "preemption" question is whether Congress has exercised its legislative power in such a manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter. *Northern States Power Co.* v. *State of Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). This Court has indicated that the legal precedents do not provide a "rigid formula" or "exclusive constitutional yardstick" for deciding preemption cases. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Much "turns upon

the peculiarities and special features of the federal regulatory scheme in question." *Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973).

State activity raising constitutional or "federal preemption" questions most often takes the form of traditional lawmaking, *i.e.*, state statutes, regulations or municipal ordinances. *E.g., Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Washington statutes and regulations regarding the design, size and movement of oil tankers in waterway); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (California weight labeling statute and regulations); *Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (City ordinance forbidding jet aircraft from taking off during night hours). However, though less frequently reflected in the cases, state activity in the form of imposition of tort or common law liability may also violate the Constitution. Thus, for example, an award of damages may exceed a state's power just as well as specific state legislation. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959):

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

In *Garmon*, this Court held that damages awarded by California courts for activities amounting to a tort under state law conflicted with controlling federal regulation of labor activities and consequently the awards could not stand.

Nor is *Garmon* a mere isolated pronouncement. In *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), this Court held that a suit and judgment (including an award of damages) under Illinois' common law of unfair competition could not be used to prevent copying of unpatented articles since to do so would conflict with the federal patent laws. The patent system is one in which "uniform federal standards are carefully used to promote invention while at the same time preserving free competition" 376 U.S. at 230-31. Thus, a state may not extend the life of a patent beyond its expiration either directly (by legislation) or indirectly (by common law remedies):

> "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." 376 U.S. at 231.

Because of conflict with the federal regulatory scheme governing patents, the state may not prohibit copying of the article "or award damages for such copying" 376 U.S. at 233. The state's legal remedies were deemed intolerable despite the state's interest in minimizing potential confusion by the public as to the source of the articles. The two federal policies of uniformity and free competition are likewise found in the Safety Act.[4]

---

[4] S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709, 2720 ("centralized, mass production, high volume character" of the motor vehicle industry "requires that motor vehicle safety standards . . . be uniform throughout the country"); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) ("uniformity of standards" intended so that public and industry is guided "by one set of criteria rather than a multiplicity of diverse standards"); S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709 ("exercise of Federal authority" can channel industry's creative energies and vast technology "into a vigorous and competitive effort to improve the safety of vehicles"); See also *Id.* at 2712 ("vigorous competition" in development and marketing of safety improvements "must be maintained").

Similarly, in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), this Court considered the clash between a civil action for libel under Michigan's law of defamation and the National Labor Relations Act. After analyzing the regulatory intent and balancing the state's interest in protecting its citizens from malicious libels, the Court concluded that a total bar of defamation claims was not necessary. Recovery of damages, however, was permissible only for *malicious* defamation. *Id.* at 65. The Court also prescribed the requirements of proof in such cases; declared the duty of the trial judge to reduce excessive awards; and prescribed a restrictive rule for punitive damage awards. 383 U.S. at 65-66. The state's common law remedies were thus only partially curtailed. However, the Court's power, under preemption principles, to limit or exclude the state's damage remedies entirely was clearly declared:

> "[I]f experience shows that a greater curtailment, even a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act." 383 U.S. at 67.

Thus, any "Supremacy Clause" clash between a state's strict tort liability remedies and federal policy in the Safety Act is properly before this Court for review and resolution.

Federal exclusion of state law is "inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963).

The imposition of "crashworthiness" tort liability pursuant to jury-established standards in a given case may

well involve a "physical impossibility" of compliance with the Federal Motor Vehicle Safety Standards ("FMVSS") promulgated under the Safety Act. For example, in *Gray* v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970), plaintiff sued for alleged negligence in failing to install a "pop-out" windshield in her automobile claiming that her injuries were aggravated when she was thrown through the windshield in a collision. Under FMVSS 212, however, the windshield mounting is required to be retained in a 30 mph forward crash into a rigid concrete barrier, a standard expressing the view that the windshield should not "pop-out." See 49 C.F.R. § 571.212. In such a case it would be a "physical impossibility" to comply with both the NHTSA's directive and the jury's *ad hoc* standard for that claim.

"Physical impossibility" might also obtain in a given case due to the intrinsic or inherent design characteristics of particular automobiles and component parts. For example, in *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974), plaintiff's experts claimed that a multipurpose van vehicle with a snub-nose and cargo carrying capacity in the rear should have been built like a 1966 Ford passenger sedan with a protruding engine in the front. Of course, such a standard, if adopted by some juries, could possibly eliminate such van vehicles and require the van-purchasing public to have only 1966 Ford-like passenger cars. Congress intended that this should *not* occur even when the Agency sets standards.[5] Similarly,

---

[5] "In determining whether any proposed standard is 'appropriate' . . . the committee intends that the Secretary will consider the desirability of affording consumers continued wide range of choices in the selection of motor vehicles. Thus it is not intended that standards will be set which will eliminate or necessarily be the same for small cars or such widely accepted models as convertibles and sports cars, so long as all motor vehicles meet basic minimum standards." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News* 2709, 2714.

"physical impossibility" might arise from conflicting jury-established standards as to the same subject matter whereas the FMVSS prescribe a different performance standard.[6] Additionally, a form of "physical impossibility" or its functional equivalent (for example, prohibitive cost) might arise when compliance with a jury-imposed standard in a particular aspect of performance would require a redesign that would practicably cause another FMVSS to be violated or a change that could result in a significant danger to the safety of occupants in other kinds of accidents.[7] To illustrate, heavy and rigid bumpers or fenders may offer some protection against intrusion but they may prove disastrous to pedestrians struck by them. High seatback head restraints may offer some protection against "whiplash" but they may compromise rearward visibility. Brighter or higher intensity lamps may improve visibility at night but they may blind drivers in other cars. Rigid seats may prevent an occupant from moving rearwards in a rear-end crash but they may increase the injuries of rear seat occupants who strike them during a frontal collision. These

---

[6] Thus, in *Seattle-First National Bank* v. *Talbert*, [1970-1973] Prod. Liab. Rep. (CCH) ¶ 6550 (Wash. Super. Ct. 1970) and *Baumgardner* v. *American Motors Corp.*, 83 Wash.2d 751, 522 P.2d 829 (1974), vehicles were claimed to be "uncrashworthy," because, among other things, the seats remained rigidly anchored during the collision and failed to yield. In *Walton* v. *Chrysler Corp.*, 229 So. 2d 568 (Miss. Sup. Ct. 1969) and *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 321 A.2d 737 (1974), on the other hand, the claim was that the design was "uncrashworthy" because the seats gave way in the collision. Under FMVSS 207, seats must withstand a certain force under prescribed test conditions and then are permitted to yield. 49 C.F.R. § 571.207.

[7] An example of the former is the "pop-out" windshield illustration discussed earlier. Another such example would be a claim that a fuel tank in a given location should be positioned elsewhere to be safer in a particular kind of accident but where such a relocation would make it practicably difficult to comply with the FMVSS that requires fuel tank integrity to be maintained in multiple test collisions from the front, rear and side. See 49 C.F.R. § 571.301-75.

An example of the latter is a claim that the body structure should

and many other engineering conflicts may create some "physical impossibility" of complying with both a federal standard and a jury-imposed standard.

Even if "physical impossibility" is not present, there may be preemptive effect by the federal scheme of regulation. Thus, if Congress manifested an intent "to displace coincident state regulation in a given area," the state activity may be excluded. *Northern States Power Co.* v. *State of Minnesota, supra,* 447 F.2d at 1146. In the Safety Act, Congress stated [15 U.S.C. § 1392(d)] that no state may establish "any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."[8] If a state proceeded to violate Section 1392(d) directly by creating standards that were not "identical" to the federal standards, there would be no question that the state requirement could not stand. Similarly, the state may not accomplish indirectly (via tort remedies in the courts) what it may not

---

be made more rigid to prevent intrusion of the passenger compartment but where added rigidity might increase accelerations upon the body, decrease energy absorption and create a more "aggressive" and "hostile" automobile to other cars on the road. Such an issue was partially presented in *Dawson* [see 630 F.2d at 959.] A 1974 report by Columbia University's School of Engineering and Applied Science assessing the advantages and disadvantages of Experimental Safety Vehicles ("ESV") is illustrative of the dangers of "beefing up" some cars at the expense of others. The authors conclude that the heavier ESV's would be more "aggressive" to cars on the road so that "a disastrous effect is not inconceivable." Tien & Testa, *Critical Assessment of Social and Economic Implications of Safety Cars,* 28 (August 1974). See also *Id.* at 95 (aggressiveness of heavy safety vehicles would actually increase traffic deaths for several years).

[8] The Safety Act makes an exception in the case of vehicles or equipment procured for a state's own use. As to such vehicles the states may establish requirements imposing "a higher standard of performance." [15 U.S.C. § 1392(d)]

accomplish by legislation. A state's activity via court judgments for damages is subject to the same constitutional scrutiny and limitations as traditional lawmaking. *Linn* v. *United Plant Guard Workers, supra,* 383 U.S. 53; *Sears Roebuck & Co.* v. *Stiffel Co., supra,* 376 U.S. 225; *San Diego Building Trades Council* v. *Garmon, supra,* 359 U.S. 236.

Where Congress has not expressly prohibited dual regulation or unequivocally declared its exclusive authority over a particular subject, federal preemption may still be *implied.* Key factors in such a determination are said to be (1) the aim and intent of Congress as revealed by the statute and legislative history; (2) the pervasiveness of the federal regulatory scheme as reflected in the legislation and as carried into effect by the agency; (3) the nature of the subject matter regulated and whether it demands "exclusive federal regulation in order to achieve uniformity vital to national interests;" and (4) whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Northern States Power Co.* v. *State of Minnesota, supra,* 447 F.2d at 1146-47.

Even if congressional intent in the Safety Act were not manifest (which it is in 15 U.S.C. § 1392(d)), implied preemption could be justified on the basis of the factors enumerated above. First, both the statute and legislative history make it clear that *uniform,* national safety standards were Congress' goal. Second, the pervasiveness of the federal regulatory scheme is reflected in the scope and breadth of the Safety Act and safety standards promulgated thereunder.[9] Moreover, the Agency carrying out the regulatory

[9] See 49 C.F.R., Part 571 which contains many FMVSS relating to safety windshields, padded dashboards, safety restraints and seat belts, safety door latches, energy-absorbing steering wheels and columns, break-away rear view mirrors, occupant protection, side door strength, seat strength, roof strength, fuel tank integrity and many others.

scheme spends many millions of dollars annually to conduct research, testing, compliance, enforcement and recall activities.[10] The subject matter is certainly one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests."[11] *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* 373 U.S. at 143-44; *San Diego Building Trades Council* v. *Garmon, supra,* 359 U.S. at 241-44. Finally, if conflicting jury-established standards vary from case to case and possibly conflict with national safety and energy policy and federal safety requirements, then the state laws "stand as obstacles" to accomplishment "of the full purposes and objectives of Congress." *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. Thus, regardless of whether the preemptive effect is deemed "express" or "manifest" [*see* 15 U.S.C. § 1392(d)] or "implied," the result is the same. The proscribed state activity must yield in whole or in part.

A holding of Safety Act preemption is not impeded by 15 U.S.C. § 1397(c) which provides:

> "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

The plain reach of this provision is simply to declare that common law liability is not excused merely because of compliance with a safety standard. Stated simply, compliance is not a defense that vitiates liability as a matter of law. The subsection, however, does *not* mean that states can act, via

---

[10] For fiscal year 1981 NHTSA requested over 355 million dollars from Congress of which $52.3 million was for traffic and motor vehicle safety programs. See BNA, Product Safety & Liability Rptr. 110 (Feb. 1, 1980).

[11] See S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2712, 2715, 2720.

common law doctrines, to frustrate the national policy against non-identical standards in a particular aspect of performance. To reason otherwise would require a conclusion that Congress' express prohibition in Section 1392(d) could simply be undone via Section 1397(c)—an absurdity.

The legislative history does not reveal any sanctity attached to common law remedies strong enough to either defy or nullify the express congressional intent to have federal uniform standards preempt non-identical state standards. On the contrary, the legislative history reveals a very limited reach for Section 1397(c). Thus, the Senate Report states that the federal safety standards "*need not* be interpreted as restricting State common law standards of care. Compliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2720 [Emphasis supplied]. The House Report states that compliance "is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). The gist of these pronouncements is merely to preclude an automatic defense. *See Stonehocker* v. *General Motors Corp.,* 587 F.2d 151, 156 (4th Cir. 1978) (Section 1397(c) prevents exemption from negligence because of compliance); *Roberts* v. *May,* 41 Colo. App. 82, 86, 583 P.2d 305, 308 (1978) (standards are statutory minima and not conclusive as to manufacturer's liability).[12]

---

[12] Cases considering the threshold question whether there is a common law *duty* to provide a "crashworthy" vehicle in the first place have referred to 15 U.S.C. § 1397(c) as an indication that regulation under the Safety Act was supplementary to the common law of products liability and that courts were therefore not powerless to act or impose such a legal duty upon manufacturers. E.g. *Arbet*

It must be remembered that in 1966 Congress could hardly have intended imposition of common law "crashworthiness" liability by precluding compliance as a defense because such actions were not yet permitted by the courts. See *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993, 999 (D.C. Cir. 1976). The Safety Act was passed just a few months after *Evans* was decided and well before the *Larsen case.*

Congress obviously was intent upon preserving the common law remedies which then existed—not upon creating new legal theories of liability.[13] When analysis of legislative history ensues to determine whether preemption by Congress was intended, the time frame of the legislative consideration is highly significant. *See Perez* v. *Campbell*, 402 U.S. 637, 654-56 (1971). (Earlier congressional intent harmonized as based upon older legal precedents). Con-

---

v. *Gussarson*, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975); *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 218, 321 A.2d 737, 746 (1974); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993, 999-1000 (D.C. Cir. 1976). These pronouncements simply state that courts may declare legal doctrines notwithstanding legislative activity under the Safety Act. They do *not* stand for the proposition that courts (or juries) may adopt, establish or impose performance standards which are not "identical" to the federal standards. State court activity to that effect could fare no better than state legislative activity because of the prohibition contained in 15 U.S.C. § 1392(d).

[13] Consider the statement of Rep. Dingell on the Floor of the House of Representatives:

> "Second, we have preserved every single common-law remedy *that exists* against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of the common law *which are afforded* to the purchaser, *remain* in the buyer, and they can be exercised against the manufacturer." 112 Cong. Rec. at 19663 (1966) [Emphasis supplied.]

gress could not possibly have intended to forcefully prohibit non-identical state standards of crash performance and yet allow such standards to be imposed via state common law remedies which had not yet been created.

In any event, 15 U.S.C. § 1397(c), by its terms, merely precludes a *per se* defense to a lawsuit. Section 1392(d), on the other hand, prohibits imposition of a state standard that is not "identical." The subsections are not mutually exclusive nor do they cancel each other out; at best, they must be construed *in pari materia.*

Although sufficient precedent exists to consider totally curtailing state tort awards because of federal preemption,[14] this Court may fully wish to consider whether at least a partial curtailment is necessary. *See Linn* v. *United Plant Guard Workers, supra,* 383 U.S. at 67.[15] In any event, the "preemption" issue is squarely presented and ripe for review by this Court upon full briefs of the litigants and interested parties. Therefore, the petition should be granted.

II.

Strict Tort Liability Judgments Based Upon Jury-Established Crash Safety Standards Inconsistent with the Safety Act are a Form of State Activity that Unduly Burden Interstate Commerce.

As indicated above, state authority, whether manifested through the legislature or the courts, is subject to the limitations which the United States Constitution places upon state

---

[14] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966).

[15] In *Linn*, the Court majority held that partial curtailment could limit libel suits to those based upon malice. Four dissenting Justices,

action. An award of damages can exceed a state's power just as well as specific legislation. See pp. 10-12, *supra.*[16] Thus, strict tort liability remedies based upon *ad hoc,* conflicting, non-uniform standards may substantially burden interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.[17] The burden is potentially twofold: first, foreign and interstate commerce is materially affected in an area where uniformity is indispensable; second, an undue financial burden is placed upon interstate commerce.

It is settled that states have no authority to regulate those phases of national commerce which, because of the

---

however, urged total curtailment of state-allowed lawsuits. One possible approach to harmonizing Safety Act objectives with products claims is to limit "crashworthiness" lawsuits to those based upon *negligence* and to curtail those suits based upon "strict tort liability." In negligence cases the jury's inquiry is whether there was an exercise of "reasonable care." *Compare,* strict tort liability theory where the manufacturer may be held liable even if he "has exercised all possible care in the preparation and sale of his product." Restatement (Second) of Torts § 402A (1965). In fact, the trial court in *Dawson* instructed the jury that Chrysler could be held liable despite its exercise of "all possible care." [Transcript at pp. 3442a-43a]. Such a charge invites juries to look beyond the federal standard as to the same "aspect of performance" and to establish their own non-"identical" standard, a result in direct conflict with 15 U.S.C. § 1392(d). It also magnifies the prospect of reaching a "physical impossibility" form of clash with federal standards. See pp. 13-15, *supra.*

[16] In *Morgan* v. *Virginia,* 328 U.S. 373, 379 (1946), the Court acknowledged that a "final court order" may be an invalid burden on interstate commerce. In *Georgia* v. *Chatanooga,* 406 F.2d 830, 833 (6th Cir. 1969), the court observed that a writ of attachment may be an invalid burden upon commerce.

[17] Imposition of state liability by an invalid regulation upon interstate commerce is constitutionally impermissible. See *Western Union Tel. Co.* v. *Brown,* 234 U.S. 542, 547 (1914) (statute authorizing suits for mental anguish for failure to deliver telegraph messages invalid); *Michigan Public Utilities Comm'n* v. *Duke,* 266 U.S. 570, 577 (1925) (statute imposing "strict liability" of a common carrier upon private carrier burdened commerce).

need of national uniformity, demand that their regulation be prescribed by a single authority. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945) (length of a train not subject to state regulation); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959) (state requirements requiring trucks to be equipped with contour mudguards held invalid); *Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978) (state regulations restricting lengths of trailer trucks operated on state highways invalid). Even when the state acts in the interest of safety, the Commerce Clause may proscribe the state activity. *Bibb* v. *Navajo Freight Lines, Inc., supra,* 359 U.S. 520; *Raymond Motor Transportation, supra,* 434 U.S. 429.

Congress has declared in its reports accompanying the Safety Act that uniformity of FMVSS is indispensable.[18] Such standards are to apply nationwide; non-identical standards in the same aspect of performance are forbidden. 15 U.S.C. § 1392(d). Thus, unlike cases in which a need for uniformity must be implied from the circumstances, here we deal with *explicit* recognition that uniformity is indispensable.

As to the "financial burden" factor, if the burden imposed on commerce is "clearly excessive in relation to the putative local benefits" it is an "undue" burden and invalid. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The primary "local benefits" involved in the application of a states tort remedies are to compensate for injuries wrongfully sustained. However, such state benefit is not inconsistent with congressional intent to have uniform standards and the prohibition against non-"identical" standards in the "same aspect of performance." The FMVSS are

[18] S. Rep. No. 1301, *reprinted in* [1966] *U.S. Code Cong. & Ad. News, supra,* at 2720; H.R. Rep. No. 1776, 89th Cong., 2d Sess., *supra,* at 17. For textual excerpts, see n. 4 *supra.*

statutorily required to "meet the need for motor vehicle safety" [15 U.S.C. § 1392(a)]. The statutory definition of "motor vehicle safety" is a "performance" of the vehicle or equipment in a manner so that the public is protected against the "unreasonable risk of accidents occurring" and against the "unreasonable risk of death or injury to persons in the event accidents do occur." [15 U.S.C. § 1391(1)]. Thus, a compliance with federal standards in a particular "aspect of performance" satisfies at least the minimally-prescribed requisites of protecting against "unreasonable risks." However, when a jury is instructed that it may virtually "establish" its own standard as to the same aspect of performance by imposing liability despite the manufacturer's "exercise of all possible care,"[19] the burden placed upon the manufacturer reaches a level that cannot practicably be discharged regardless of the expenditure.

The financial burden of satisfying every conceivable jury-established standard that differs from the federal standard on a particular aspect of performance is prohibitive if not impossible. It is, for example, impossible to satisfy two different standards where a jury, in effect, says a windshield should "pop out" and an FMVSS says it should not "pop out" upon a collision. *Cf. Gray* v. *General Motors Corp., supra,* 434 F.2d 110; 49 C.F.R. § 571.212. The manufacturer bears the financial burden of complying with one performance criterion only to be possibly penalized by a huge verdict when he cannot comply with the other. Thus, a "strict liability" based solely upon a jury's own view of what the performance standard should be destroys

---

[19] See Restatement of Torts (Second) § 402A (1965). In *Dawson,* the trial court instructed the jury that if they found the essential elements of New Jersey's form of "strict liability," then Chrysler "is liable even though you may find and believe that Chrysler exercised all possible care in the preparation and sale of its product." [Transcript at pp. 3442a-43a].

the uniformity deemed so indispensable by Congress. At the same time, the "incoherence in the safety requirements set by disparate juries" [630 F.2d at 953] or the conflict of the jury requirement with other national policies [*Ibid.*] imposes a further intolerable burden upon interstate commerce in financial terms. The "local benefit" of compensating a wrongfully injured party is thus "clearly exceeded" by the burden of liability despite a manufacturer's exercise of "all possible care."

As stated by the Third Circuit below in the instant case:

> "It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents." 630 F.2d at 962.

Since the verdict and judgment exceeding $2.5 million in *Dawson* is a reflection of potential "crashworthiness" exposures in a given suit, the financial burden is obviously enormous. The damages here involved, coupled with the frequency of injurious accidents potentially giving rise to claims in which jurors apply their own version of safety standards, is astronomical. The cost of the potential liability, whether borne through insurance premiums, the price mechanism or directly from a company's operating funds, is an economic consequence of such magnitude as to justify Commerce Clause scrutiny by this Court. As time goes by, more and more "crashworthiness" claims are filed and the financial burden continues to grow. Accordingly, the time is ripe for review and resolution by this Court.

Conclusion

For the foregoing reasons, MVMA submits that a writ of certiorari should issue in this case and that full review of the policy considerations be undertaken upon full briefs by the litigants and interested parties.

Dated: January 19, 1981

Respectfully submitted,

HERBERT RUBIN
MICHAEL HOENIG
HOWARD S. EDINBURGH

HERZFELD & RUBIN, P.C.
Attorneys for MVMA
as Amicus Curiae

Of Counsel:
WILLIAM H. CRABTREE
General Counsel

EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Assn.
of the United States, Inc.